Regulations under the *Employment Standards Act*

A Consultation Paper

Northwest Territories Education, Culture and Employment

Introduction

The *Employment Standards Act* provides the legal framework for employment relationships in the Northwest Territories, and sets out the minimum standards and requirements for certain aspects of that employer-employee relationship in most workplaces in the Northwest Territories. The legislation includes standards respecting hours of work and rest, statutory holidays, minimum wage, various forms of leave, employment of people younger than 17 years of age, and rules for ending employment. It also provides for the regulation of employment agencies and the recovery of wages. The Act was enacted in August 2007 and, when it is brought into force, will replace the *Labour Standards Act*, the *Employment Agencies Act* and the *Wages Recovery Act*.

The new Act addresses issues that arise in employment relationships at a general level. It also includes authority to make regulations that provide more detailed rules respecting how the Act is to operate. While some of these regulations will be similar to those that exist under the *Labour Standards Act* and the *Employment Agencies Act*, others may be developed.

This consultation paper is part of the Department of Education, Culture and Employment's review and consultation process to ensure that the regulations that are made under the *Employment Standards Act* support effective employment relationships and reflect northern values. This consultation paper will review options for regulations under the *Employment Standards Act* for public review and comment.

Scope of the Review

The purpose of this review is to identify your concerns and preferences with respect to issues to be addressed by regulation under the *Employment Standards Act*. Although there is no intention to make regulations addressing matters outside those set out in this paper, the Department will consider all comments and suggestions.

Application of the Legislation

The *Employment Standards Act* generally applies to all employment relationships in the Northwest Territories within the Government of the Northwest Territories' jurisdiction. The Act does provide exceptions for employees employed primarily in a managerial role (exempt from hours of work and overtime rules) and employees whose employment is governed by the *Public Service Act*. The Act also provides that exceptions to the application of the Act may be made by regulation.

The Department is considering making regulations that would exempt, in whole or in part, certain employment relationships from the application of the Act.

Members or students of professions

The Department has received a number of comments indicating that some flexibility is desirable when regulating the employment of professionals. Professionals are not exempt from any of the minimum standards set out in the *Labour Standards Act*. Most stakeholders indicated that the hours of work and overtime rules in the Act are not practical for certain professions. Other stakeholders indicated that regulation of professional employment relationships through employment standards legislation is not appropriate where the professions are self-regulated under NWT legislation.

In the NWT, there are a number of professionals who are regulated by legislation. The Department has received feedback from some professional associations that their respective professions should not be regulated by employment standards legislation. The following factors have been cited as rationale for exclusion of the professions in whole or in part from employment standards legislation:

- The regulatory environment that professional businesses operate under requires an approach to training students that can be in conflict with provisions in the Act dealing with hours of work and leave;
- The nature of professional work is such that it does not easily fit within a standard work day or week, and as such is in conflict with standards in the Act related to hours of work and leave;
- The application of employment standards legislation to self-regulated professions creates a secondary and potentially conflicting layer of regulation;
- The application of employment standards legislation to professions can cause difficulties for professional firms as they compete with southern firms to recruit and retain professional employees; and
- The regulatory environment in which the profession operates already provides a mechanism in which disputes between an employer and employee practicing in the profession can be resolved.

Professions that are excluded from employment standards legislation, in whole or in part, in other jurisdictions include but are not limited to students and professionals in nursing, medicine, midwifery, law, accounting, and dentistry. The approach used by other jurisdictions in the regulation of these professions is set out below.

Profession	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario
Nursing	Partial exclusion for students – HOW, OT, SH, LV, VC	No exclusion	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH	No exclusion
Medicine	Full exclusion	No exclusion	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH, MW	Partial exclusion – HOW, OT, SH, VC, MW
Midwifery	No exclusion	No exclusion	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH, MW	No exclusion
Law	Full exclusion	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH, MW	Partial exclusion – HOW, OT, SH, VC, MW
Accounting (CA, CMA, CGA)	Full exclusion for CAs only	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH, MW	Partial exclusion – HOW, OT, SH, VC, MW
Dentistry	Full exclusion	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT	Partial exclusion – HOW, OT, SH, MW	Partial exclusion – HOW, OT, SH, VC, MW

Legend:
HOW – Hours of Work
OT – Overtime and Overtime Pay
SH – Statutory holidays and holiday pay
LV – Unpaid leave
VC – Annual Vacation and Vacation Pay
MW – Minimum Wage

On the basis of stakeholder feedback on this issue, the Department is proposing to enact regulations to exempt the nursing, medical, midwifery, legal, accounting and dental professions and their students from the application of hours of work and overtime standards under the *Employment Standards Act*. This proposal allows professional firms greater flexibility in scheduling work, and competitiveness in their ability to recruit and retain employees while maintaining minimum standards for those employees working in the profession.

Question:

What concerns if any do you have respecting the proposed partial exemption of professionals from the standards in the *Employment Standards Act*?

Truck Drivers

All long-haul truck drivers are subject to the limitations on hours of work contained in the *Hours of Service Regulations* under the *Motor Vehicles Act* (NWT). These limitations have been established in consultation with other jurisdictions with a view to ensuring safety for users of public highways. Truck drivers who are employees are also subject to hours of work standards in the *Employment Standards Act* that apply to employees in other industries.

The application of the Act to only part of the trucking industry means that drivers who are employees cannot work as many hours as independent contract drivers. That is, the legislation arguably places certain trucking operations in the NWT at a competitive disadvantage to others. The Department has also received feedback that the requirement to obtain a permit for employees to work extended hours is an unnecessary regulatory burden in light of the extensive regulatory requirements in the *Hours of Service Regulations*.

On the basis of this feedback and discussions with the Department of Transportation, the Department is proposing to enact regulations to exempt truck drivers from the standards in the Act dealing with maximum hours of work where those standards are in conflict with limitations on hours of work set out in the *Hours of Service Regulations*.

Question:

What concerns if any do you have respecting the proposed partial exemption of employee truck drivers from the standards for maximum hours of work in the *Employment Standards Act*?

Agricultural workers

Agricultural workers in the NWT are subject to the same employment standards that exist for other employees. In some jurisdictions, agricultural workers are exempted from provisions of employment standards legislation in recognition of the unique demands of working in agriculture and to maintain competitiveness with the agricultural sector in other jurisdictions in Canada.

Questions:

1. Does the agricultural sector in the NWT need to have exemptions in place for agricultural workers that are similar to those in other Canadian jurisdictions?

2. If so, what standards in the *Employment Standards Act* should not apply to agricultural workers?

Students in Work Experience Programs

Students that are engaged in work experience programs as part of their secondary school curriculum are currently exempted in part from the operation of the *Labour Standards Act* by permit issued by the Labour Standards Officer. These programs exist primarily to provide skill development and experience to students in secondary school, and not as wage employment. As such, there seems to be no reason for extending the Act's provisions respecting minimum wage, hours of work, vacation and statutory holidays, leave and termination.

The Department proposes to exempt the student and employer participating in a work experience program from the application of the *Employment Standards Act* without requiring a permit. This exemption will continue to be applicable only when the work experience program is part of the secondary school curriculum.

Question:

What concerns if any do you have respecting the proposed exemption of students enrolled in Work Experience Programs from the standards in the *Employment Standards Act*?

Construction workers

Currently, the general requirement that an employer provide an employee with notice of termination and termination pay is not applicable to an employee who is employed in the construction industry. This exemption is meant to accommodate the need of the construction industry to have flexibility to hire and terminate staff in a timely manner in response to the availability of work in the marketplace. There is currently no definition for the term "construction" to clarify the scope of the exemption granted. Feedback from stakeholders in a previous consultation indicates that a definition of this term is desirable.

The Department is proposing that the term "construction" be defined as employment for the purpose of clearing brush and trees or constructing, reconstructing, repairing, altering or demolishing any work of construction, including the preparation for or the laying of the foundations of any such work or structure. It is further proposed that the definition exclude activities that can be characterized as mining or regular maintenance to ensure the minimum standards in the Act continue to apply where an employee is not engaged in employment that is primarily construction.

The Department is proposing that the regulations continue to provide that the standards in the *Employment Standards Act* dealing with notice of termination and termination pay not be applicable to employees employed in construction.

Questions:

1. How should the term "construction" be defined for the purposes of setting the scope of the notice of termination and termination pay exemption under the *Employment Standards Act*?

2. How should the terms "mining" and "regular maintenance" be defined to distinguish them from construction?

3. What concerns if any do you have respecting the approach proposed by the Department for clarifying the scope of the exemption provided to the construction industry?

Domestic Workers

The Department does not currently regulate domestic workers under the *Labour Standards Act*. Feedback from stakeholders has indicated that the employment of domestic workers should be regulated under employment standards legislation. Accordingly, the Department is proposing to regulate domestic workers under the *Employment Standards Act*.

In order to regulate the employment of domestic workers, it is the Department's position that regulations will need to be enacted to prescribe standards that are somewhat different than the standards applicable to other types of employment. Some of these alternate provisions are set out below:

The Department proposes enacting regulations that:

1) define "domestic worker";
2) exempt domestic workers from the hours of work provisions in the *Employment Standards* Act where alternate hours of work provisions are addressed in a written employment agreement;
3) exempt domestic workers from the overtime provisions of the Act where the issue of overtime and overtime pay is addressed in a written employment agreement;
4) exempt domestic workers from the days of rest provisions of the Act and, instead, require one day off per week;
5) exempt domestic workers from the statutory holiday provisions of the Act and provide that domestic workers are entitled to statutory holiday pay as a percentage of wages paid; and
6) provide that an employer may deduct a maximum amount each month from the pay of a domestic worker for room and board.

Definition of "Domestic Worker"

A definition of the term "Domestic Worker" is required to be able to identify when an employee is or is not a domestic worker. The Department is proposing that the term "domestic worker" means:

- a person who is employed to provide cooking, cleaning, gardening, maintenance, chauffeuring, child care, nursing or other personal services at the residence of his or her employer;
- who is living in the residence where the above-mentioned services are provided; and
- who has entered into a written employment agreement to provide the above-mentioned services.

Employees that do fall within the definition of "domestic worker" will be subject to the general standards set out in the *Employment Standards Act*.

Question:
What concerns if any do you have respecting the Department's proposed definition of "domestic worker"?

Hours of Work and Overtime

Among those jurisdictions that regulate domestic workers, employment standards legislation provides alternative provisions for hours of work and entitlement to overtime. These alternative provisions are provided to reflect the unique work environment and scheduling of work that are inherent in the employment of domestic workers.

The Department proposes to exempt domestic workers from the application of the hours of work and overtime provisions in the *Employment Standards Act* in those instances where these issues are specifically addressed in a written employment agreement between the employer and domestic worker. This proposal is meant to strike a balance between the need to regulate domestic workers' hours of work and overtime entitlements and the unique scheduling demands of the work of domestic workers.

Questions:

1. Do you have any concerns respecting the Department's proposed exemption of domestic workers from the Act's standards respecting hours of work and overtime?

2. If so, what approach to hours of work would you suggest to balance the need for regulation of domestic workers' hours of work and overtime entitlements and the need to accommodate the unique scheduling demands of the work of domestic workers?

Days of rest

The general days of rest provisions in the *Employment Standards Act* provide a minimum standard for the number of days in a week or consecutive weeks that must be taken as days of rest. Other jurisdictions that regulate domestic workers often provide alternate provisions on days of rest for domestic workers.

The Department proposes to exempt domestic workers from the application of the general days of rest provisions in the Act as it is felt that the general provisions will not provide adequate weekly rest for domestic workers. It is proposed that the regulations will require that domestic workers be provided with a minimum of one day of rest per week.

Questions:

1. Do you have any concerns respecting the Department's proposed approach to minimum days of rest for domestic workers?

2. If you disagree with the Department's proposal, what would you suggest as minimum days of rest for domestic workers?

Statutory Holidays and Statutory Holiday Pay

The provisions in the *Employment Standards Act* entitle eligible employees to paid time off on prescribed statutory holidays. The Department proposes to exempt domestic workers from the application of the statutory holiday and statutory holiday provisions of the Act to provide needed flexibility in the employment of domestic workers. As an alternative, it is proposed that the regulations require employers to pay statutory holiday pay to domestic workers as a percentage of the domestic worker's wages.

Questions:

1. What concerns if any do you have respecting the Department's proposed approach to statutory holidays and statutory holiday pay for domestic workers?

2. What percentage of the domestic worker's wages should be paid as statutory holiday pay?

Room and Board

The *Employment Standards Act* provides that regulations may be made to fix the maximum price to be charged for room and board supplied by an employer to an employee, and fixing the maximum deduction to be made by the employer from the employee's wages for room and board. The Department is proposing regulations that would set a maximum price of room and board for domestic workers and set how much can be deducted from the wages of domestic workers for room and board.

Questions:

1. What concerns if any do you have respecting the Department's proposed approach to regulating the cost of room and board for domestic workers?

2. Do you have any suggestions respecting what the fixed maximum amount should be for room and board?

Definition of "family member" – bereavement leave & compassionate leave

The *Employment Standards Act* provides employees with a new entitlement to bereavement leave and compassionate leave. Bereavement leave exists to provide employees with unpaid leave from employment for the purposes of attending a funeral or memorial service of a family member. Compassionate leave exists to provide employees with unpaid leave from employment for the purposes of providing care to a terminally ill family member.

The Act currently provides that the following persons are defined as a "family member" of the employee for the purposes of bereavement and compassionate leave:

- the employee's spouse,
- the child of the employee or the child of the employee's spouse,
- the parent of the employee or the spouse of the employee's parent,
- any additional family members prescribed in the *Employment Insurance Act* (Canada) or in the *Canada Labour Code* – currently none prescribed, and
- any other persons in a class prescribed by regulation under the *Employment Standards Act*.

The Department is considering additions to the types of family relationships that will be included in the definition of "family member" for the purposes of bereavement and compassionate leave.

The definition of "family member" is typically in relation to the employee and the employee's spouse. Other jurisdictions in Canada define who is considered a family member as set out below:

Relationship	Can	BC	Sask	Man	Ont	QC	NB	NS	PEI	Nfld	Yuk	Nu
Spouse	B, C	B, C	B	B, C	B, C	B		B, C	B, C	B, C	B	C
Parent	B, C	B, C	B	B, C	B, C	B		B, C	B, C	B, C	B	C
Child	B, C	B, C	B	B, C	B, C	B		B, C	B, C	B, C	B	C
Sibling	B	B, C	B	B, C	B, C	B		B	B, C	B	B	
Uncle/Aunt		C		B, C	C					C		
Grandchild	B	B, C	B	B, C	B, C	B		B	B	B, C	B	
Grandparent	B	B, C		B, C	B, C	B		B	B	B, C	B	
Nephew/Niece				B, C	C					C		
Foster Parent				B, C	B, C					C		
Any person resident in the employee's home	B	B, C									B	
Any person with a close family relationship to employee					C		B, C			C		
Son/Daughter in law						B				C	B	

Legend:
B – Leave for bereavement purposes
C – Compassionate Leave

Questions:

1. Who should be considered a family member for the purposes of bereavement leave?

2. Who should be considered a family member for the purposes of compassionate leave?

Minimum Wage

The *Labour Standards Act* provides that minimum wage in the NWT is $8.25 per hour. This rate has not been increased since December, 2003. The Department will be setting the minimum wage by regulation under the new *Employment Standards Act*. Prior to enacting this regulation, the Department will consider feedback from the public respecting the adequacy of the current minimum wage rate.

The basic hourly minimum wage rate in other jurisdictions is set out below:

British Columbia	$8.00	New Brunswick	$7.25
Alberta	$8.00	Nova Scotia	$7.60
Saskatchewan	$7.95	PEI	$7.50
Manitoba	$8.00	Nfld & Labrador	$7.00
Ontario	$8.00	Yukon	$8.37
Quebec	$8.00	Nunavut	$8.50

Questions:

1. Is there a need to change the minimum wage of $8.25 per hour?
2. How often should the Department review the minimum wage?
3. What factors should the Department consider in proposing a minimum wage?
4. How much notice should employers and employees be provided prior to the implementation of any change in the minimum wage?
5. What is an appropriate minimum wage?

Other Regulations

In addition to the proposed regulatory provisions set out above, the Department will be enacting regulations substantively similar to the following regulations:

- *Annual Vacations Regulations*,
- *Labour Standards Meal Regulations*,
- *Notice of Termination Exemption Regulations*,
- *Pregnancy and Parental Leave Regulations*,
- *Employment Agencies Regulations*
- *Wages Regulations*, and
- *Reciprocating Jurisdictions Order*.

The Department of Education, Culture and Employment welcomes your comments and suggestion on the proposed regulations under the Employment Standards Act. Please send your comments and suggestions by February 28, 2008 to:

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